KONTENA NASIONAL BHD

v.

HASHIM ABD RAZAK

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINAATING MOTION NO: R2-25-95-99]
17 OCTOBER 2000

LABOUR LAW: *Employment - Transfer - Whether amounted to constructive dismissal - Industrial Relations Act 1967, s. 33*

LABOUR LAW: *Industrial Court - Jurisdiction - Judicial review - Grounds for*

The respondent claimed for constructive dismissal in a transfer which he regarded as a demotion. The issue for determination before the Industrial Court was whether the respondent was transferable within the terms of his contract of employment and if in the affirmative, whether the transfer amounted to a demotion.

The Industrial Court held that the respondent's dismissal was without just cause or excuse and that he was to be reinstated to his former position and awarded him backwages. The applicant applied for an order of *certiorari* to quash the award.

Held:

[1] It is settled that for an order of *certiorari* to be issued, it must be shown that the Industrial Court committed an error of law and/or acted in excess of and/or without jurisdiction in arriving at its conclusion.

[2] On the authorities, the reasonableness or *bona fides* of a transfer is irrelevant in a claim of constructive dismissal arising from the transfer of an employee. The correct test is the contract test, *ie*, "whether the company was guilty of a breach which went to the root of the contract or if the company evinced an intention no longer to be bound by it."

[3] The fact of the respondent being assigned duties which were inconsistent and incompatible to his position as manager, required to report to a senior manager and not the chief executive, and having his company car withdrawn does not constitute grounds for pleading constructive dismissal, and neither was the respondent's feeling of humiliation and frustration.

[4] Furthermore, subsequent to receiving the transfer order, the respondent applied for leave and a transfer allowance which is an implicit acceptance to the transfer but the Industrial Court chose to disregard this.

[5] As the Industrial Court never arrived at a finding that there was a breach of the implied term of mutual trust and confidence on the ground relied upon by the respondent, it had committed an error of law affecting its jurisdiction. The Industrial Court's conduct in failing to take relevant matters into consideration, taking irrelevant matters into consideration and reaching a decision which was so perverse that no reasonable body or persons or tribunal in similar circumstances would have reached, taken individually and collectively amount to serious errors in law affecting its jurisdiction and accordingly an order of *certiorari* should be issued.

[Application for certiorari granted.]

Case(s) referred to:

Antah Sandilands Sdn Bhd v. Teh Sing [1995] 2 ILR 40 ***(refd)***
Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 ***(foll)***
Ayer Molek Rubber Co Bhd, The v. Mohd Sah Mohd Ali [1998] 2 ILR 62 ***(refd)***
Balakrishnan Krishnasamy v. Western Digital (M) Sdn Bhd [2000] 1 AMR 429 ***(refd)***
Funai Electric (M) Sdn Bhd v. Saliah Ahmad [2000] 2 CLJ 655 ***(refd)***
Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 ***(refd)***
Kumpulan Perangsang Selangor v. Zaid Hj Mohd Non [1997] 2 CLJ 11 ***(refd)***
Lum Lai Heng v. Menteri Sumber Manusia & Securicor (M) Sdn Bhd (Originating Motion No. R1-25-34-96) (unreported) ***(refd)***
OYL Condair Industries Sdn Bhd v. Anandan Lingam [1995] 1 ILR 394 ***(refd)***
Pexxon Sdn Bhd v. Sia Qui Yau [1989] 1 ILR 235 ***(refd)***
Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 ***(refd)***
R Ramachandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union [1995] 2 CLJ 748 ***(refd)***
Talasco Insurance Sdn Bhd v. Industrial Court of Malaysia & Anor [1997] 4 CLJ 97 ***(refd)***
Western Excavating v. Sharp [1978] 1 All ER 713 ***(refd)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45 ***(foll)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(1), (3), 33

For the applicant - Suganthi Singam; M/s Shearn Delamore & Co
For the respondent - P Thavaselvi (KC Wong); M/s P Kuppusamy & Co

Reported by Yow Ting Fong

JUDGMENT

Faiza Tamby Chik J:

The facts of the case leading to the dispute are as follows. The respondent commenced employment with the applicant on 1 March 1980 as an executive. The respondent was eventually appointed as Branch Manager of the applicant with effect from 2 January 1993 based in Johor. By a letter dated 23 July 1996, the respondent was required to show cause to five charges contained in the said letter. (pp. 12-13 of Siti Shamsiah binti Haji Shaari's affidavit hereinafter referred to as "SS's affidavit"). The respondent replied to the charges by a letter dated 29 July 1996 (pp. 14-86 of SS's affidavit). By a letter dated 12 August 1996, the applicant informed the respondent that the reply was unsatisfactory and that an inquiry was to be conducted in respect of seven charges as contained in the appendix to the letter (p. 123 of SS's affidavit). The inquiry proceeded as scheduled and the respondent was found guilty of two out of the seven charges. The respondent was duly informed of this through a letter dated 13 September 1996 and was issued a severe warning (p. 124 of SS's affidavit). The respondent was also informed that he was to be transferred to the applicant's head office to the Business Development Unit with effect from 16 September 1996. The job description of a Manager of Business Development Unit dated 16 September 1996 was also appended to the letter of transfer (pp. 38-40 of SS's affidavit). The respondent accepted the transfer and reported to the Chief Executive Officer on 16 September 1996. The respondent subsequently applied for five days' leave to move his family from Johor Bahru to Kuala Lumpur (p. 363 of SS's affidavit). The respondent returned after leave on 23 September 1996, and therefore applied for the transfer allowance subsequent to the transfer (p. 364 of SS's affidavit). By a letter dated 1 October 1996, the respondent claimed that he had been constructively dismissed with immediate effect (p. 41 of SS's affidavit). The applicant responded through their letter of 4 October 1996 (p. 43 of SS's affidavit). Pursuant to the representations made by the respondent under s. 20(1) of the Industrial Relations Act 1967, the Honourable Minister of Human Resources referred the matter to the Industrial Court through s. 20(3) of the Act and the reference was registered as Industrial Court case No. 4/4-420/97. The Industrial Court in Award No. 355 of 1999 held that the respondent's dismissal was without just cause or excuse and that he be reinstated to his former position. The

respondent was also awarded backwages in the amount of 22 months. The applicant has also filed an application under s. 33 of the Industrial Relations Act 1967. However that application has not been heard yet. In the light of the applicant's application *vide* s. 33 of the Industrial Relations Act 1967, the respondent has not been reinstated pending the outcome of the application.

It is settled that for an order of *certiorari* to be issued, it must be shown that the Industrial Court committed an error of law and/or acted in excess of and/or without jurisdiction in arriving at its conclusion. The applicant's grounds for an order of *certiorari* to issue are threefold in that the Industrial Court had:

(i) Failed to apply the test as laid down in *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ 45, and the Court of Appeal in *Anwar bin Abdul Rahim v. Bayer (M) Sdn. Bhd.* [1998] 2 CLJ 197;

(ii) Taken irrelevant matters into consideration and failed to take relevant matters into consideration; and

(iii) Came to a decision that was so perverse and devoid of plausible justification that no reasonable body of persons or tribunal on similar circumstances would have reached.

The law on judicial review has been succinctly restated by the Federal court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687. The Federal Court at p. 710 cited the following passage from *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 748 and held that it accurately declares the present state of the law:

> In *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union,* the Court of Appeal correctly recognised that *Anisminic* had done away with the distinction between errors of law that go to jurisdiction and errors that do not. We are of the opinion that the following extract from the judgment of the Court of Appeal accurately declares the present state of the law [1995] 2 CLJ 748 at p. 765):
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> > An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial functiqn or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek*

> *Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 CLJ 619), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of general law.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunized from judicial review by an ouster clause however widely drafted.

I do not propose to delve into the numerous authorities relating to constructive dismissal. Suffice to say that the Federal Court recently upheld the decision of the Court of Appeal in the case of *Anwar bin Abdul Rahim v. Bayer (M) Sdn. Bhd.* [1998] 2 CLJ 197 which applied the contract test in a constructive dismissal matter. *Bayer*'s case applied the principles in the case *celebre* of Supreme Court in *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ 45. Mahadev Shankar JCA in delivering the judgment of the Court of Appeal stated at pp. 205:

> It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an attention no longer to be bound by the contract'. (See *Holiday Inn, Kuching v. Elizabeth Lee Siok* [1992] 1 CLJ 141 and *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 MLJ 92 at p. 94).
>
> In the court below, Low Hop Bing J found that the chairman had applied the wrong test. We agree.

In the court below, the learned judge of the High Court held:

> The Industrial Court's finding that the conduct of the applicant was "not justifiable", not *"bona fide"* and so constitutes "embarrassment" clearly shows that it had erroneously applied "the rest of reasonableness" and not "the contract test", and so has acted in excess of jurisdiction constituting an error of law. In the circumstances, I grant an order in terms of this motion.

In the instant case, the respondent's basis for treating himself as dismissed is grounded on his transfer as Branch Manager to Manager of the Business Development Unit Kuala Lumpur which he contended amounted to a demotion. The issue for determination before the Industrial Court was firstly whether the respondent was transferable within the terms of his contract of employment and if in the affirmative, whether the transfer amounted to a demotion. It was undisputed that the respondent was subject to transfer. He in fact conceded to this during cross-examination and this was also accepted by the Industrial Court (refer p. 428 of SS's affidavit). Notwithstanding the fact that the Industrial Court concluded that the claimant accepted the transfer and reported to the Chief Executive Officer on 13 September 1996, the Industrial Court proceeded to examine the *bona fides* of the transfer when it stated as follows:

> The transfer so sudden was a demotion and it was not a *bona fide* exercise of the prerogative of an employer to transfer his employees. The transfer was actuated by indirect motive and not made for the purpose it proclaimed to be, ie, an inter-department transfer in order to keep an eye on the Claimant. It was a punishment cloaked in the form of transfer and it was a humiliation.

(Page 428 of SS's affidavit).

On the authorities of the Supreme Court's decision in *Wong Chee Hong*'s case and the Court of Appeal in *Bayer*'s case, the reasonableness or *bona fides* of the transfer are irrelevant in a claim of constructive dismissal arising from the transfer of an employee. Reading para. 20 of the respondent's affidavit in reply will reflect that the respondent is not challenging the applicant's right to transfer him but the *bona fides* of the transfer. These issues would only come into play when an employee is dismissed pursuant to a transfer order. In the recent decision of *Funai Electric (M) Sdn. Bhd. v. Saliah bt. Ahmad* [2000] 2 CLJ 655 the respondent had pleaded constructive dismissal pursuant to a transfer order and succeeded in the Industrial Court. On an application for judicial review, the High Court in granting the applicant an order of *certiorari* stated at pp. 660-661:

> What the Industrial Court meant was that the transfer was unreasonable. The Industrial Court having recognised that the company had the prerogative of transfer – in fact it was a term of her appointment and she had agreed that the company was acting within the terms of "transfer" – the Industrial Court was wrong in suing the test of "unreasonableness" on the transfer when the test should be in accordance with the Supreme Court case of *Wong Chee Hong* whether the company was guilty of a breach which went to the root of the contract of if the company evinced an intention no longer to be bound by it, the "contract test".

However, I am informed that an appeal has been filed in respect of this decision and this matter is currently pending in the Court of Appeal. The Industrial Court has also adopted this proposition as is reflected in the case of *OYL Condair Industries Sdn. Bhd. v. Anandan a/l Lingam* [1995] 1 ILR 394. In *OYL Condair*'s case the claimant's claim of constructive dismissal was premised on the unreasonableness and lack of *bona fides* of the transfer. The court in dismissing the claimant's claims held that in a claim for constructive dismissal, the reasonableness and *bona fides* of the transfer are not relevant. In the instant case, having recognised that the respondent was subject to and had accepted the transfer, the Industrial Court went on a frolic of its own in examining the *bona fides* of the transfer. Whilst the Industrial Court had made reference to the correct test to be applied, ie, the contract test, a perusal of the award will amply demonstrate that the Industrial Court had for all intents and purposes applied the unreasonableness test to the matter before it. Since the respondent was subject to and had accepted the transfer, it would follow that the primary basis on which his claim of constructive dismissal rested on collapsed. The Industrial Court in entering into the forbidden domain of unreasonableness when examining the respondent's transfer had clearly misconstrued the law relating to constructive dismissal, taken irrelevant matters into consideration and had failed to take relevant matters into consideration.

In a judicial review the review is generally on the decision making process of the tribunal. It is apparent from the foregoing that the Industrial Court in the process of reaching its conclusion that there was a constructive dismissal, had clearly erred in law and acted in excess of its jurisdiction. On the authorities cited earlier, the decision of the Industrial Court was clearly a nullity. In any event, even if the court could have inquired into the reasonableness of the transfer, the authorities are clear that the transfer is generally a management prerogative which should not be interfered with in the absence of any *mala fides*. In the instant case, the applicant's decision to transfer the respondent was to enable the applicant to monitor the respondent's performance more closely, pursuant to the findings of the domestic inquiry. The applicant was only exercising it's managerial prerogative in transferring the respondent to supervise his performance. I am of the view that it is for the applicant to determine who would be in the best position to discharge the relevant functions in the company. The High Court in *Talasco Insurance Sdn. Bhd. v. Industrial Court of Malaysia & Anor.* [1997] 4 CLJ 97 held that:

> The 1st respondent had gone too far in the purported exercise of its jurisdiction to determine whether the 2nd respondent was dismissed by the applicant on account of the reorganisation. It was not for the 1st respondent to decide for the applicant who would be best to perform what function in its organisation. It was the applicant's prerogative to decide who would be more suitable for a particular job for so long as in the making of that decision it acted in good faith and that the 2nd respondent's responsibilities, salary and all other terms and conditions of service with the applicant remained unchanged. Loss of pride alone would not constitute a dismissal of the 2nd respondent by the applicant.

Pursuant to the charges which had been leveled against the respondent and in light of the findings of the domestic inquiry, the applicant was of the view that the respondent could not discharge the functions which were vested in him efficiently, which necessitated the transfer.

In the instant case, the respondent's main bone of contention lay in the fact that he considered his transfer to be a demotion as he was assigned duties which were inconsistent and incompatible to his position as manager, he was required to report to a Senior Manager and not the Chief Executive and the company car he had been using had been withdrawn. At p. 434 of SS's affidavit the Industrial Court held that:

> In examining the Claimant's job functions and status as Branch Manager in Johor and what he was expected to perform at the headquarters as Manager, Business Development it does appear he did not carry the same powers and authority as that of Branch Manager because he did lose substantial benefits and status he used to enjoy. There is no dispute he was deprived of a company car and was not given a room or secretary and had less personnel reporting to him. The nature of his job description was different; it was that of an Assistant Manager.

I am of the view that the aforegoing does not constitute grounds for pleading constructive dismissal. There are numerous awards of the Industrial Court that have dismissed claims of constructive dismissal which have proceeded in reliance on the aforesaid grounds; Award No. 409 of 1995, Award 403 of 1995 and Award No. 257 of 1995 are to name but a few. Reference is made to paras. 25-18 of the respondent's affidavit in reply. The respondent was clearly upset, humiliated and frustrated by the transfer, however on the authorities cited earlier this does not entitle him in law, to treat himself as having been constructively dismissed. In *Bayer*'s case, the claimant had relied on the grounds that he had been relieved of his administrative functions, his car park had been taken away, his secretary and staff had been removed, he was not named as personnel and administrative manager and the request to exchange rooms with another

employee. The claimant succeeded in his claim in the Industrial Court. The High Court in granting an order of *certiorari* to quash the Industrial Court's award held that the reasons relied upon by the respondent in treating himself as having been constructively dismissed did not in any way satisfy the principles established in the Supreme Court's decision in *Wong Chee Hong*'s case. In Award No. 409 of 1995 the claimant had commenced employment as a senior officer. In contending that he had been constructively dismissed the claimant relied on the ground that his functions and responsibilities were taken away from him in that he had been assigned to undertake a special function to do manpower planning for his department which was not managerial in nature whereas prior to this the claimant claimed that he was responsible for the whole department. Additionally he contended that the new assignment required him to work alone on the project and the job was more clerical in nature. In dismissing the claimant's claim the court held at p. 616 as follows:

> In short the Court holds that if the claimant was relieved of his other duties to enable him to do the manpower planning assignment the company was justified to do so in the circumstances of the case. The new assignment was an important assignment and not clerical in nature. The claimant could not cope with the assignment. He left the company in spite of the company asking him to come back. The scolding of the claimant by his superior on one occasion did not portray a situation where the company had lost confidence and trust in the claimant.

Similarly in Award No. 403 of 1995, the court at p. 590 in dismissing the claimant's claim of constructive dismissal held that:

> As far as on the part of the companies are concerned, there seem no breach of the terms of contract of employment, because all these happenings which are alleged to have been committed by the companies on the claimant, namely, that she being asked to share the same room with the managing director and chief executive, not given proper work and not given sufficient staff, do not seem to show a motive on the part of the companies, which, if taken cumulatively, could tantamount to a breach of the said contract.

In the instant case, one of the reasons on which the respondent had relied upon in considering his transfer to be a demotion was due to the fact that other assistant managers reported to the senior manager to whom he was also required to report to. The mere fact that the respondent had been required to report to the Chief Executive Officer previously, was not reflective of his status nor position. There was no contractual provision for the respondent's line of reporting. In any event the applicant's witness had given evidence that as the Senior Manager of Business Development was the head of that unit, the respondent would be required to report to him.

The case of *Lum Lai Heng v. Menteri Sumber Manusia & Securicor (M) Sdn. Bhd.* Originating Motion No. R1-25-34-96 which concerned a minister's non-reference is relevant. In this case, the applicant treated himself as having been constructively dismissed on the grounds that *inter alia;* pursuant to a restructuring exercise, she was required to report to her junior who had been promoted as overall head of the merged Accounting & EDP Department whereas previously the applicant was the head of the Accounting Department. The 1st respondent in deciding not to refer the matter was of the view that the 2nd respondent was undergoing a restructuring exercise to enhance the company's information system. In the process, the 2nd respondent had merged the Accounts Section with that of MIS. The 1st respondent was also of the view that with the merger, the applicant continued to hold the post of the head of the Account Section and the appointment of the new unit head in the merged department was not with a view to demote the applicant of her post or to affect her status as the head of the account unit. The High Court upheld the 1st respondent's decision and dismissed the applicant's claims. If as in *Lum Lai Heng*'s case the change of line of reporting to a person who had previously been the applicant's junior did not constitute ground to treat oneself as having been constructively dismissed a *fortiori* how can in the instant case the change of reporting to a person junior in rank to the CEO constitute a demotion. Further the respondent had contended that he was demoted as he was assigned job functions which were inconsistent and incompatible with his position as manager (see para. 19(e) of the respondent's affidavit in reply). The mere fact that the transfer resulted in redesignation of the duties of the respondent does not affect the validity of the transfer in the first place, nor does it amount to a demotion. As regards the respondent's complaint regarding the withdrawal of his car, the applicant's witness had given evidence that the respondent's new assignment in Kuala Lumpur did not require a car and instead he had been given a car allowance of RM800. Additionally as he had become a non-operational manager, he was not entitled to the car by virtue of a decision which was taken in June 1995 (see p. 362 of SS's affidavit). COW1 had confirmed that there were no non-operational managers who had been given a company car. (see p. 19 of Sivabalah Nadarajah's affidavit). In the absence of a contractual entitlement to the car, a withdrawal of the same cannot amount to a fundamental breach of contract. In respect of the respondent's contention that he was not given a room nor a secretary, it would be pertinent to note that these grounds were only raised subsequent to him treating himself as having been dismissed. In any event, COW1 had given evidence that the applicant had been preparing a room for the respondent

and that the respondent would take over the secretary of Mr. Chue (see p. 19 of Sivabalah Nadarajah's affidavit). The respondent had also attempted to make an issue of the fact that he had only been given 48 hours notice of his transfer from Johor Bahru to Kuala Lumpur. The respondent was clearly more upset with the manner in which the transfer was effected as opposed to whether the transfer amounted to a fundamental breach of his contract. His testimony is clear indication of this:

> I went to Kuala Lumpur on the 14.09.96 and met the CEO at 10.00 a.m. and was given the letter. The CEO asked me to open the letter before him. After reading the letter I was taken aback on the transfer issue. To me a severe warning would suffice. I also told the CEO it was not human to transfer me so immediate because all my family is in Johor.
> (page 10 of Sivabalah Nadajarah's Affidavit).

In *Antah Sandilands Sdn. Bhd. v. Teh Sing* [1995] 2 ILR 40, the claimant transferred from the position of regional sales manager north to that of sales manager (one-way products) central. In dismissing the claimant's claim, the court stated at p. 45:

> The court then considered whether the transfer and the change of responsibility was a demotion. The onus of proof that he was demoted is on the claimant. On the balance of probabilities, the Court would only hold that the action of the company in transferring him to a new post and not explaining to him that the new post was as important as his former post and that he was expected to develop and exploit the vast potential of the new products that he was to be in charge of not providing him with supporting staff equally senior in service as in his former position and not immediately providing him all the facilities that he used to enjoy in his former position was only at the worst unreasonable on the part of the employer. Such unreasonable conduct is not a good ground for claiming constructive dismissal. This is following the decision in *Western Excavating Ltd. v. Sharp* [1978] QB 761 which was adopted by the Supreme Court in *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ 45.

It is my observation that the applicant's failure to discuss the transfer with the respondent whilst under no obligation legally to do so, provide him with a room and secretary immediately, at the most, may constitute unreasonable conduct, which does not entitle the respondent to treat himself as having been constructively dismissed. Therefore it is explicit that the Industrial Court had failed to have regard to these relevant matters in arriving at its decision and accordingly artived at a conclusion which was undoubtedly perverse.

A perusal of the respondent's pleadings will demonstrate that the basis on which the respondent had relied upon in contending that the applicant had breached the implied duty of mutual trust and confidence was founded on the purported acts of the applicant leveling unfounded and baseless allegations against the respondent and subsequently issuing him with a warning letter and transferring him. This can be seen from the relevant paragraphs from the statement of case which are as follows:

> Statement of Case
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> 10. By a letter dated 1st October 1996, the Claimant informed the Company that he was treating himself as constructively dismissed by the Company with immediate effect. The Claimant states that the conduct or act of the Company which were repudiatory in nature and which were calculated to drive him out of employment are as follows:
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> (a) the Company had *vide* a letter dated 23rd July 1996 made unfounded and baseless allegation against him;
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> (b) the Company *vide* a letter dated 13th September 1996 found him guilty of two of the seven charges leveled against him and had issued him with a severe warning;
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> 11. The acts of the Company in leveling unfounded and baseless allegations against the Claimant and subsequently issuing him with a warning letter amounted to fundamental breaches of the Claimant's contract with the Company as they were in breach of the implied duty of mutual trust and confidence.

The company in its statement in reply, denied the allegations as set out in the statement of case. The company maintained that he was guilty of the two charges and that the two charges justified the sanctions imposed on him. Based on the pleadings of the parties, since the respondent's claim and the Industrial Court's finding of a breach of the implied term of mutual trust and confidence was premised on the action taken on the respondent pursuant to the domestic inquiry's finding, it was incumbent on the Industrial Court to determine if the charges had been made out and if so whether the misconduct warranted the action taken. It is implied in any employment relationship that the employer can hold an inquiry for any alleged misconduct and if the employee is found guilty, to take the appropriate action (see Award Nos. 459 of 1997 and 120 of 1999).

In *Balakrishnan a/l Krishnasamy v. Western Digital (M) Sdn. Bhd.* [2000] 1 AMR 429, the applicant was a security supervisor in the company. Whilst on duty, the applicant was caught sleeping by two other security guards. The company carried out investigations and the applicant was issued

with a notice of inquiry as the company was dissatisfied with the applicant's reply to the show cause notice issued to the applicant. Based on the evidence adduced, the domestic inquiry found the applicant guilty of sleeping whilst on duty. Although it was recommended that the applicant be terminated, the managing director of the company decided to demote the applicant to senior security guard with the reduction of one increment as although the misconduct was serious in nature, the applicant had served the company for a long period of time and this was his first serious misconduct, the applicant was demoted with a reduction in salary. Being dissatisfied with the demotion and the reduction in salary, the applicant demanded that the company restore him to his previous position of security supervisor as well as restore his salary within seven days, failing which, he would consider himself constructively dismissed. The company rejected the applicant's request. Pursuant to which, the applicant treated himself as having been constructively dismissed. The Industrial Court dismissed the applicant's claim. On an application for an order of *certiorari* in the High Court, in dismissing the applicant's claim I said:

> In order for the applicant to claim constructive dismissal, the applicant who bears the burden must satisfy the court that the respondent no longer intends to be bound by the contract by adducing evidence in court that the demotion by the respondent was unjustified. It is evident from the said test that the respondent does not bear a burden to prove either that the demotion was justified. On the contrary, it is for the applicant to have proven that the respondent's conduct of demoting the applicant amounted to a breach of contract which entitled the applicant to treat himself as dismissed. Intrinsic in this is that the applicant would have to establish that there was in fact no misconduct justifying the respondent's course of action.

In the instant case, the Industrial Court failed to make any such finding that the allegations preferred against the respondent were baseless and the warning unjustified. In the absence of any such finding, the court's conclusion that there was a breach of the implied term of mutual trust and confidence was clearly erroneous and perverse. The Industrial Court had completely ignored the pleadings of the respondent in its statement of case but instead came to a finding that there was a breach of the implied term of mutual trust and confidence based on facts that were never pleaded nor relied upon by the respondent. This was a clear case of the Industrial Court basing its decision on an unpleaded case and without regard to the pleadings of the parties. The authorities are clear that the Industrial Court is obliged to consider and base its decision on the pleadings of the parties and it has no jurisdiction to make a decision on the strength of an unpleaded case. In *R. Ramachandran v. The Industrial Court of Malaysia & Anor.*

[1997] 1 CLJ 147, the claimant had raised the issue of bias in his statement of case before the Industrial Court however the Industrial Court had failed to consider this issue. The Federal Court held that the failure of the Industrial Court to address its mind to the issue of bias which was in their view the central pillar of his case amounted to a serious error affecting its jurisdiction, resulting in its award being quashed. Eusoff Chin CJ stated at p. 162:

> It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil court (s. 30 of the Industrial Relations Act 1967) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider. In this case, the Industrial Court had totally failed to consider the allegations of misconduct but simply concluded that because the letter of termination was grounded on retrenchment exercise, it is not bound, and therefore, not obliged to consider the issues of bias and misconduct.

Further support for the proposition advanced in *Ramachandran*'s case is found in the Supreme Court's decision in *Kumpulan Perangsang Selangor v. Zaid bin Hj. Mohd. Noh* [1997] 2 CLJ 11. The court there held that the Industrial Court was wrong in upholding the respondent's termination on a ground not advanced by the appellant and affirmed the High Court's decision to issue *certiorari* to quash the Industrial Court's Award. Gopal Sri Ram JCA said at p. 22:

> As to the claimant being redundant and so he was dismissed, in my considered view the Industrial Court had made an error. In the first place, such a plea as loss was never pleaded by the respondent. What in fact was in evidence was that the company underwent reorganization and resulted in the claimant being redundant. Suffice to say that the Industrial Court made an error in its trying to find another reason for the claimant's dismissal, different from what was stated to be the reason by the respondent as a misdirection and an error in law. It is true to say that and I find it to be so that redundancy because of the abolishing of job function has not been made out.

And at p. 28 Gopal Sri Ram JCA further stated:

> At the risk of repetition, we emphasize that here there was no proof that the respondent's post had been abolished. Nor, we may add, was there a specific finding by the Industrial Court that the post in question had been abolished. The material made available at all levels admits of only one reasonable inference, namely that the post was not abolished. It follows that not only did the Industrial Court find for the appellant on an unpleaded case, the appellant had itself failed to make out the justification relied upon by it. There was, therefore, no redundancy as alleged by the respondent. The inevitable conclusion we reach on the proved and undisputed facts is that the respondent was dismissed from his employment and that his dismissal was without just cause or excuse.

In light of the foregoing it is my opinion that the Industrial Court had failed to take relevant matters into consideration, took irrelevant matters into consideration and arrived at a decision which was so perverse and devoid of plausible justification that no reasonable body of persons or tribunal in similar circumstances could have reached and accordingly, its decision cannot be permitted to stand.

In situations of constructive dismissal, the law on affirmation of a contract was succinctly stated in the following passage in the case of *Western Excavating v. Sharp* [1978] 1 All ER 713. At p. 717 Lord Denning MR said:

> On the one hand, it is said that the words of Sch I, para 5(2(c), to the 1974 Act express a legal concept which is already well settled in the books on contract under the rubric 'Discharge by breach'. If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

In the instant case, it was expressly pleaded in the statement in reply that the respondent had acquiesced and accepted the conditions imposed subsequent to the domestic inquiry. In view of this, the Industrial Court's failure to address it's mind as to whether there was an affirmation of the

breach, if any amounted to an error of law. The respondent was informed of the transfer to Headquarters with effect from 10 September 1996. The respondent reported to the Head Office and he was informed of his assignment as Manager to the Business Development Unit. Subsequent to receiving the transfer order, the respondent applied for leave on 17 September 1996-21 September 1996 (p. 363 of SS's affidavit) and a transfer allowance on 23 September 1996 in the amount of RM7,050 (p. 364 of SS's affidavit). Having received the monies and proceeding on transfer, the respondent then elected to treat himself as having been constructively dismissed. It may be observed that implicit in the respondent's conduct is an acceptance to the transfer. However the Industrial Court chose to disregard the respondent's conduct when it proceeded to hold that the respondent had been dismissed without just cause or excuse. In *Pexxon Sdn. Bhd. v. Sia Qui Yau* [1989] 1 ILR 235, the learned Chairman of the Industrial Court in citing *Wong Chee Hong*'s case with approval held as follows at p. 240:

> So the length of time is a crucial factor by which the claimant must act to repudiate the contract based on the breach, that goes to the root of that contract. The period of one month has been held to be unreasonable for the Claimant not to have acted against his employer. It seems that once an employee has discovered that there is substantial breach or breaches of employment that goes to the root of the contract of the employment he must so act immediately either by protesting or giving notice to the employer and walking out of the job, otherwise he might be said to have affirmed the new term of the contract, thereby accepting it with the terms added. All this is to be decided on the facts of each case.

Similarly in Award No. 1 of 1993, the delay of three weeks in the claimant treating himself as dismissed was construed as the employee electing to affirm the contract rather than accept the repudiation to end the contract.

In the case of *Ayer Molek Rubber Co. Bhd., The v. Mohd. Sah Mohd. Ali* [1998] 2 ILR 62, pursuant to several restructuring exercises, the claimant was eventually redesignated to the post of Group Manager, Special Project (estate division) and transferred to Melaka. The claimant had contended that the redesignation involved a relegation of duties as his duties were merely involved overseeing the estate division of the company and not the whole group anymore. At p. 71, Mohd. Noor Yahya, the learned Chairman said:

> It would seem to me that the reasons as submitted by the learned counsel for the claimant are an after thought and are never the reasons looking at the circumstances for the case. If the reason is the transfer order then the order of transfer was made on 24 July 1995 (Exh. CLB6). On 29 July 1995 the

claimant gave a reply stating that he thought the transfer tantamount to a variation to his contract of employment with the company. He never at that stage claimed himself to have been constructively dismissed. Only on 7 August, 1995 vide his letter exh. CLB12 that he considered himself constructively dismissed. Even assuming there was a breach by the company he had delayed too long in terminating the contract in response to the company's breach. He was deemed to have waived the breach and agreed to vary the contract. In conclusion on the facts of the case I find the company even if it were guilty of conduct it is not a significant breach going to the root of the contract or which shows that the company no longer intends to be bound by one or more of the essential terms of the contract.

In the instant case the respondent was aware of his transfer as early as 16 September 1996, however he only elected to treat himself as having been constructively dismissed on 1 October 1996, after a lapse of over two weeks. If anything the respondent's conduct from the notification of the transfer is reflective of an affirmation of a breach if any which nevertheless is denied. Either the transfer was a breach or it was not. If it was, then the respondent's delay in treating himself as having been constructively dismissed only on 1 October 1996 is fatal as reflected in the foregoing awards.

The respondent has contended that whilst the employer may possess the prerogative to transfer an employee, the court must also examine whether the exercise of that prerogative has been in a *bona fide* manner. I am of the opinion that the foregoing is an accurate statement of the law only in so far as in situations where the employee is dismissed pursuant to a transfer order. Conversely where an employee treats himself as having been constructively dismissed pursuant to a transfer order, the only issue for determination of the Industrial Court is whether the applicant was acting within the parameters of the respondent's contract of employment. In examining the motives behind the transfer and concluding that the actions of the company amounted to a punishment in the form of a transfer and was a humiliation, the Industrial Court had overstepped the boundaries curtailing its role in a constructive dismissal situation arising from a transfer order.

Accordingly the application of the unreasonbleness test as opposed to the contract test in the instant case amounted to an error of law necessitating an order of *certiorari* to issue. I draw support from the decision of High Court in *Funai Electric (M) Sdn. Bhd. v. Saliah bt. Ahmad* [2000] 2 CLJ 655 which also concerned the respondent's claim of constructive dismissal pursuant to a transfer from the Shipping Department to the Service Parts Department. In granting the applicant for an order of *certiorari*, the

High Court held that the duty of the presiding tribunal is to ascertain whether the employer has been guilty of such conduct that tantamounts to a fundamental breach of contract. The question of the reasonableness of the employer's actions does not arise in such circumstances. In the recent decision of the Court of Appeal in *Quah Swee Khoon v. Sime Darby Bhd.* [2001] 1 CLJ 9, the Court of Appeal stated whether or not a High Court has exercised an appellate functions depends upon the approach taken by it in a particular case. A trial judge would have indeed exercised such a function, in an application for *certiorari*, if he inquires into and disturbs the findings of fact based on the credibility of witnesses. I am of the view that this application does not fall within the purview of appellate interference but is one of a review for substance. A reading of the award will demonstrate that the Industrial Court's findings were not based on the credibility of the witnesses unlike *Quah Swee Khoon*'s case. The respondent contended that the Industrial Court considered the allegations leveled against the respondent and the warning issued and as set out in the respective paragraphs. Whilst the Industrial Court had set out the respective case for the company and the claimant in the preceding pages of its award, a thorough examination will reflect that the Industrial Court failed to make any finding that the said allegations were baseless and the warning unjustified, which were the specific grounds relied upon by the respondent in contending that there had been a breach of the implied term of mutual trust and confidence. The Industrial Court held that there was a breach of the aforesaid implied term on an entirely different and unpleaded ground. The respondent placed heavy reliance on the decision of the Court of Appeal in *Quah Swee Khoon v. Sime Darby Bhd.* [2001] 1 CLJ 9 to support its contention that the Industrial Court did not venture beyond the respondent's pleaded case in the instant case. The facts in *Quah Swee Khoon*'s case are distinguishable. In *Quah Swee Khoon*'s case, the grounds or the facts relied on by the claimant to plead constructive dismissal were the same and had been pleaded. The Court of Appeal in that case held that the facts as pleaded were sufficiently precise and the question whether one could describe the conduct complained of as sufficient to plead contructive dismissal or the breach of the implied term was really a matter of semantics. In the instant case, the Industrial Court held that there was constructive dismissal on grounds and facts that were not pleaded or relied upon by the respondent. The respondent had specifically pleaded that there had been a breach of the implied term of mutual trust and confidence in view of the applicant's conduct in leveling purportedly unfounded and baseless allegations against the respondent and subsequently issuing him with a warning letter. Instead of considering and deciding on this, the Industrial Court held there was constructive dismissal on entirely

different facts and grounds. The law as laid down by the Federal Court in *Ramachandran*'s case that the parties to a matter are bound by their pleadings is equally applicable in instant case. As the Industrial Court never arrived at a finding that there was a breach of the implied term of mutual trust and confidence on the ground relied upon by the respondent, I am of the opinion that it had committed an error of law affecting its jurisdiction. The Industrial Court's conduct in failing to take relevant matters into consideration, taking irrelevant matters into consideration and reaching a decision which was so perverse that no reasonable body of persons or tribunal in similar circumstances would have reached, taken individually and collectively amount to serious errors in law affecting its jurisdiction and accordingly an order of *certiorari* should be issued. Wherefore I grant for an order in terms of this application.